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R. *v.* Larue, [2003] 1 S.C.R. 277, 2003 SCC 22

Her Majesty The Queen *Appellant*

v.

Norman Eli Larue *Respondent*

Indexed as: R. *v.* Larue

Neutral citation: 2003 SCC 22.

File No.: 29329.

2003: April 14.

Present: Gonthier, Iacobucci, Bastarache, Binnie and Arbour JJ.

on appeal from the court of appeal for british columbia

Criminal law — Sexual assault — Accused charged with aggravated sexual assault but convicted of included offence of aggravated assault — Trial judge not properly applying test for sexual assault to facts of case — Accused's acquittal on charge of aggravated sexual assault set aside and guilty verdict entered.

Cases Cited

Applied: *R. v. Chase*, [1987] 2 S.C.R. 293.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, s. 676(1).

APPEAL from a judgment of the British Columbia Court of Appeal (2002), 167 C.C.C. (3d) 513, 172 B.C.A.C. 119, 282 W.A.C. 119, [2002] B.C.J. No. 1903 (QL) (*sub nom. R. v. N.E.L.*), 2002 BCCA 448, dismissing the Crown's appeal from the trial judge's decision acquitting the accused of aggravated sexual assault and convicting him of the lesser included offence of aggravated assault. Appeal allowed.

Jennifer Duncan, for the appellant.

Joseph J. Blazina, for the respondent.

The judgment of the Court was delivered orally by

1 GONTHIER J. — The Court is of the view that this appeal should be allowed. Madam Justice Prowse, in her dissent, has stated:

> At trial, Mr. Larue entered a plea of not guilty to aggravated sexual assault, but guilty to the included offence of aggravated assault. The trial proceeded on the greater charge. The fundamental issue at trial was whether the Crown had established, beyond a reasonable doubt, that when Mr. Larue slashed the throat of the complainant, he did so in circumstances which were sexual in nature. The trial judge had a reasonable doubt in that regard and acquitted Mr. Larue of sexual assault. Mr. Larue did not testify or call evidence at trial.
>
> It is common ground that the Crown can only appeal from an acquittal on a question of law alone (s. 676(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 . . .).

> The only issue on appeal is whether the trial judge erred in law in finding Mr. Larue not guilty of sexual assault.
>
> ((2002), 167 C.C.C. (3d) 513, at paras. 2-4)

2 As set out in *R. v. Chase*, [1987] 2 S.C.R. 293, at p. 302, in determining whether an assault is sexual in nature, the trier of fact is required to ask whether, "[v]iewed in the light of all the circumstances . . . the sexual or carnal context of the assault [would be] visible to a reasonable observer". This is an objective test that focusses on the sexual integrity of the victim.

3 The trial judge stated with respect to the complainant:

> Her pants and panties are off, he is on top of her, and he has a knife.

And he further continues:

> The onus of proof is upon the Crown to prove the offence of sexual assault beyond a reasonable doubt, and for the reasons expressed, I am left with a reasonable doubt.

The reasons expressed may be found in the preceding paragraphs of his reasons :

> [The complainant] agreed that her pants and panties may have been removed before she realized that the accused was on top of her. On the evidence, there may have been some romantic activity between [the complainant] and the accused, before he attacked her with a knife, and this may have been consensual.
>
> There may have been some sexual activity between [E.L.] and [the complainant]. The fact that neither [of two witnesses] noticed such activity does not mean that it could not have occurred. If it did, and [the complainant] was in a blacked out state, such as was described in the evidence, it may have been consensual between she and the accused, or between she and [E.L.] or [E.L.] may simply have removed her pants with some intentions of his own.

4 However, the trial judge had found that at the time of the assault, the complainant was naked from the waist down, and the accused was on top of her with a knife. Having regard to these facts, how she became undressed, and any prior sexual activity, were legally irrelevant considerations. The trial judge erred in law in basing his reasonable doubt on them.

5 We agree with Prowse J.A. that, on the facts as found by the trial judge, the *Chase* test is met. Accordingly, we would allow the appeal, set aside the acquittal of aggravated sexual assault, and enter a verdict of guilty. The case is referred back to the trial court for sentencing.

Judgment accordingly.

Solicitor for the appellant: Ministry of the Attorney General, Vancouver.

Solicitors for the respondent: McCullough Parsons Blazina, Victoria.